IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-303

WILLIAM E. COLBY and
VERNON A. WALTERS,

Petitioners,

v.

RODNEY D. DRIVER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONERS

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This brief will limit reply only to arguments of respondents not addressed by the petitioners Stafford, Carrouth and Meadow in their reply brief in *Stafford* v. *Briggs,* No. 77-1546, set for argument in tandem with this case, which raises the same statutory issue. Respondents in this case have been served with a copy of the reply brief filed in *Stafford.*

I. The Scope of Section 1391(e) Cannot Be Expanded By Implication.

The constant thread in respondents' argument is that the legislative history of the Mandamus and Venue Act of 1962 is "ambiguous" and that Congress might have intended the venue

portion of the Act, 28 U.S.C. §1391(e), to apply to personal damage actions against federal employees. Respondents seem to say that if there is no real evidence of such intent, it then should somehow be implied.

Respondents suggest this in a variety of ways. They begin their argument by quoting the First Circuit's opinion which specifically found the legislative history of Section 1391(e) to be "at best ambiguous." Resp. Br. at 9. Respondents then characterize the Committee Hearings, upon which they rely, as "somewhat ambiguous". Resp. Br. at 30. Respondents contend that the case comes down to this:

> "The question is simply whether Congress could have had such suits in mind when it began to rethink §1391." Resp. Br. at 28.

Having thus framed the issue, respondents proceed to answer by quoting the muse of the First Circuit:

> " 'there are indications that the drafters of the legislation understood that the act might apply to actions such as this one and were not sufficiently bothered by that possibility to prevent it.' " *Id.*

Respondents' apparent resolution of this case proceeds from a fallacious premise.

Congress in its Reports went to great lengths to show in clear language its intent that the Mandamus and Venue Act would apply only to actions in essence against the United States. Whenever Congress addressed actions against officials in their "individual" capacities, it carefully qualified its statements to indicate that it was contemplating suits brought against individuals as "nominal" defendants. These suits had fictional bases. The detailed Committee Reports discussed the mischief the statute was intended to remedy from all viewpoints. Yet there is no discussion of the type of personal damage action respondents claim the statute covers.

Congress would not have focused so sharply and explicitly on the mischief it sought to correct and then by silence and

ambiguity left it open for the courts to determine whether it "might" have intended the Mandamus and Venue Act to apply to a nascent *Bivens*-type damage suit.

Respondents' inventive interpretation of Section 1391(e) is in reality nothing less than a drastic revision of normal concepts of jurisdiction. It sweeps away all of the procedural safeguards which have long been developed in the area of personal jurisdiction. To view this case, as the First Circuit did, on the basis of the issue presented by respondents—whether Congress "might have" intended this result—is to abandon the sound principle established by the Court in *Robertson* v. *Railroad Labor Board,* 268 U.S. 619 (1925).

In *Robertson* the issue was similar to that discussed by respondents: whether Congress "impliedly" changed the general rule of personal jurisdiction. *Id.* at 622. The Court pointed out that whenever Congress departed from the general rule, it was "clearly expressed and carefully guarded". *Id.* at 624. The Court concluded that it would be "extraordinary" for Congress to change the rule by implication and that:

> "It is not lightly to be assumed that Congress intended to depart from a long established policy." *Id.* at 627.

Respondents' suggestion that the Court decide this case based upon implication and guess must be rejected.

II. The Justice Department Did Not Acknowledge That Section 1391(e) Would Apply to Bivens-Type Actions.

Respondents insist that in Deputy Attorney General White's 1962 letter to Senator Eastland, annexed to the Senate Report, the Justice Department acknowledged the bill would apply to suits for money judgments against federal officials. Resp. Br. 5, 11-12. This is a mistake. The letter states—to the contrary—the understanding of the Department of Justice that the "purpose" of the sponsors of the bill did not include "money judgments against officers." Senate Report at 6-7.

III. Section 1391(e) Is Limited to Suits Maintainable Only in The District of Columbia.

Respondents urge a "simple explanation" of the Committee Reports' repeated statements of the act's purpose—to modify jurisdiction and venue in actions which "may now be brought only in the U.S. District Court for the District of Columbia", *e.g.*, Senate Report at 2. They say that when Congress said this it was only talking about Section 1 of the statute, 28 U.S.C. §1361. Resp. Br. at 16.

To support this misstatement respondents look again to Deputy Attorney General White's letter and not the Committee Reports. The Committee Reports make crystal clear that both Section 1361 and Section 1391(e) were specifically limited to actions which could then only be maintained in the District of Columbia:

> **"Purpose.**
>
> The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report at 1; *see also* Senate Report at 1.
>
> * * *
>
> "This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." Senate Report at 2; *see also* House Report at 2.

Again, when the House Report begins discussion of Section 2 of the bill, Section 1391(e), the Committee says:

> "Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." House Report at 2.

The House Report leaves no doubt of Congress' intent:

> "The problem of venue in actions against Government officials for judicial review of official action arises when the action must be brought against supervisory officials or agency heads whose official residences are, with few exceptions, in the District of Columbia." House Report at 2.

It follows that when the Reports note that the "venue problem also arises in an action against a Government official seeking damages", this must be read in the context of the venue problem just addressed by Congress. The problem arose in cases where the need to join a superior federal official as a nominal party presented the obstacle which limited venue to Washington, D.C. *E.g., Webster* v. *Fall,* 266 U.S. 507 (1925). In those actions, where money judgments were sought, the official was sued "individually" only to circumvent the bar of sovereign immunity. The official was a "nominal" party and was not ultimately liable for the judgment. That is, the "venue problem" which concerned Congress arose only in actions brought in essence against the United States. House Report at 3.

> "The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require *similar venue provisions* where the action is based upon the *fiction* that the officer is acting as an individual." House Report at 4 [Emphasis added].

Respondents' treatment of Judge Friendly's analysis of the statute's limitation to actions which could only have been brought in Washington, D.C. is incorrect. *Natural Resources Defense Council, Inc.* v. *TVA,* 459 F.2d 255, 258-259 (2d Cir.

1972). The Second Circuit did not hold that the TVA fell within the "unless otherwise provided by law" phrase in Section 1391(e), because Section 8(a) of the TVA Act, 16 U.S.C. §831g(a), is not a venue statute. Rather, the court held that the TVA did not come within the "mischief" the statute sought to remedy because suits against the TVA did not "lie only in the District of Columbia." 459 F.2d at 259.

A year earlier, this Court held that Section 1391(e) "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." *Schlanger* v. *Seamans,* 401 U.S. 487, 490 n.4(1971). Respondents' lawsuit could not previously have been brought only in the District of Columbia. This remains a fatal flaw in the theory of respondents' case.

IV. Respondents' Suit Is Not in Essence Against the United States.

Respondents try to bootstrap their case into the statute by a last minute claim that their suit is somehow in essence against the United States. Resp. Br. at 24. The test is whether petitioners would have to pay any judgment out of their own pockets. This is precisely what respondents seek.

Petitioners are in fact the real parties in interest in this case; they are not nominal parties. *Osborn* v. *Bank of the United States,* 9 Wheat. 737, 858 (1824); *Quern* v. *Jordan,* 47 U.S.L.W. 4241, 4244 n. 17 (U.S. March 5, 1979). Since a personal money judgment is sought against the individual defendants this is not a suit in essence against the United States. *See Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, 464 (1945).

V. Similar Federal Question Cases Were Unknown in 1962.

Although there were some rare cases against federal officials in their individual capacities in the federal courts, based on state law and diversity jurisdiction, those suits were subject

to the broad official immunity defense. There simply were no federal question cases remotely similar to the case at bar in 1962, *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652 (1963), and it is absurd to suggest that Congress enacted Section 1391(e) with such suits in mind.

VI. Section 1391(e) Serves Its Purpose Even Though It Does Not Supply Personal Jurisdiction.

Respondents argue that Section 1391(e) would serve no purpose at all if it did not supply personal jurisdiction. Resp. Br. at 31. If an official is sued as a nominal defendant in an action "in essence against the United States", clearly there is no problem of personal jurisdiction. The United States is "present" throughout the nation. In 1962 the only obstacles to such actions were subject matter jurisdiction (cured by Section 1361) and venue and service (cured by Section 1391(e)). Thus the statute fully serves its stated purpose without destroying the long-established ground rules of *in personam* jurisdiction.

VII. The Due Process Issue.

Respondents rely on the Second Circuit's decision in *Mariash* v. *Morrill,* 496 F.2d 1138 (2d Cir. 1974), to answer the due process issue.

That case concerned Section 27 of the Securities Exchange Act, 15 U.S.C. §78aa, and *in personam* jurisdiction over defendants who had engaged in purposeful activity in New York. Requiring them to defend in the Southern District of New York did not impose a substantial burden on defendants' right to an opportunity to be heard. Indeed, on its face Section 27 does not present a due process problem because the statute specifically limits the districts in which suit can be brought to the districts where the defendant is found, is an inhabitant, transacts business, or where an act or transaction in violation of the Act occurred.

Mariash, decided before this Court's decision in *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), simply did not address the due process issue presented in this case.

Respondents argue that Congress has already weighed the burden of litigation in this type of case and found no infirmity. Resp. Br. at 40. To the contrary, Congress only weighed the relative inconveniences to the parties in suits in essence against the United States, where the United States defends the action and pays the judgment.

In this case the United States may or may not pay for petitioners' legal counsel. It is a matter of grace and discretion. 28 C.F.R. §§50.15, 50.16.

> "Although government counsel now often defend even personal actions against federal officers arising out of their official duties, they are not required to do so." *Expeditions Unlimited* v. *Smithsonian Institution,* 566 F.2d 289, 292 n.7 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 3144 (1978).

The Court has long recognized that:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly,* 176 U.S. 398, 409 (1900).

Petitioners' right to due process cannot depend solely on who pays their legal fees. The calamity of litigating scattered suits seeking enormous judgments in far away forums has little to do with legal fees which are burdens of litigation wherever a case is brought.

Conclusion

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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